

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:GEO:ATL:TL-N-4001-00
CLRountree

date: August 17, 2000

to: Mr. William Cooper
Manager, LMSB Group 1361
Koger Center, Stop 652-D

from: District Counsel, Georgia District, Atlanta

ject: Language of Proposed Form 872-A Covering Tax and Other Items
Attributable to Partnership Items

Taxpayer: [REDACTED]

E.I.N.: [REDACTED]

Taxable Year Ended December 31, [REDACTED]

This is in response to the oral request on August 15, 2000 of Revenue Agent Carla Langland for clarification of our memorandum dated July 27, 2000 related to approved language of proposed Special Consent to Extend the Time to Assess Tax (Form 872-A) related to the consolidated federal income tax return (Form 1120) of [REDACTED] for calendar year [REDACTED].


Based on our previous memorandum, the language of paragraph (5) of the proposed Form 872-A should be as follows:

Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b), but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to a partnership [and/or limited liability company that has elected to be treated as a partnership]

shall not terminate this agreement for other partnerships [and/or limited liability companies that have elected to be treated as partnerships] or for items not attributable to a partnership [and/or limited liability company that has elected to be treated as a partnership]. Similarly, an assessment not attributable to a partnership [and/or limited liability company that has elected to be treated as a partnership] shall not terminate this agreement for items attributable to a partnership [and/or limited liability company that has elected to be treated as a partnership].

We have inserted brackets around and underlined the amendments recommended by our previous memorandum. Please delete such brackets and underlining in the actual Form 872-A provided to [REDACTED].

If you have any questions, please contact me at 404/338-7943.



CAROLYN L. ROUNTREE
Special Litigation Assistant

cc: TL Cats

cc: Mr. Roy Allison
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Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:GEO:ATL:TL-N-4001-00
CLRountree

date: July 27, 2000

to: District Director, Georgia District
Attention: Mr. William Cooper
Examination Group 1361
Koger Center, Stop 652-D

from: District Counsel, Georgia District, Atlanta

Subject: Language of Proposed Form 872-A Covering Tax and Other Items
Attributable to Partnership Items
Taxpayer: [REDACTED]
E.I.N.: [REDACTED]
Taxable Year Ended December 31, [REDACTED]

This is in response to the oral request on July 6, 2000 of Group Manager William E. Cooper for review of a proposed Special Consent to Extend the Time to Assess Tax (Form 872-A) related to the consolidated federal income tax return (Form 1120) of [REDACTED] for calendar year [REDACTED]. Such proposed Form 872-A contains language covering any increases in tax and other items attributable to partnership and affected items, computational adjustments, and partnership items converted to nonpartnership items under I.R.C. §6231

Subject to modifications (discussed below) that add specific coverage of limited liability companies (LLCs) that have made elections to be treated as partnerships, we have concluded that the proposed Form 872-A will extend the applicable period for assessment to an indefinite date after [REDACTED].

Issues

I. Whether the applicable limitation period for assessment of [REDACTED] income tax and other items related to partnerships and LLCs in which [REDACTED] and its subsidiaries have interests can be extended through a Form 872-A executed by [REDACTED] within the applicable limitation period. U.I.L.: 6229.02-00; 6229.06-00; 6501.08-00; 6501.08-17

A. Whether the applicable limitation period is governed by I.R.C. §6501 or §6229.

B. Whether [REDACTED] is a partner under I.R.C. §6231(a)(2) for purposes of execution of a consent to extend the applicable assessment period.

Facts

[REDACTED] is the parent corporation of a group of subsidiaries that have elected to file consolidated Forms 1120 on a calendar year basis.

[REDACTED] and/or [REDACTED]'s subsidiaries are partners in and/or members of partnerships and/or LLCs that may be subject to the provisions of I.R.C. §6221 through §6234, inclusive (TEFRA) for [REDACTED].

However, we do not know the following matters for all such partnerships and LLCs: (a) their identities; (b) the taxable years of such partnerships and LLCs; (c) the due and/or filing dates of the related returns for such partnerships and LLCs; and (d) the existence of any elections under I.R.C. §6231(a)(1)(B)(ii) and Temporary Regulation §301.6231(a)(1)-1T(b).

The original due date of [REDACTED]'s [REDACTED] Form 1120 was Monday, [REDACTED]. I.R.C. §6072(b) and §7405. However, on [REDACTED], [REDACTED] filed its return under an extension. I.R.C. §6081; Treas. Regs. §1.6081-3(a) and §1.6081-3(b). Consequently, the general three-year period for assessment of tax related to [REDACTED]'s [REDACTED] Form 1120 will expire on [REDACTED]. I.R.C. §6501(a).

The Internal Revenue Service (Service) seeks to secure an indefinite extension of the limitation period for its [REDACTED] tax liability attributable to partnerships and LLCs that are subject to and not subject to TEFRA through a proposed Special Consent to Extend the Time to Assess Tax (Form 870-A). I.R.C. §6501(a) and §6501(c)(4).

The proposed Form 872-A does not specifically address any TEFRA partnerships, LLCs, or related items. However, to protect the Service's right to assess any tax and affected items related to TEFRA partnerships and LLCs, the proposed Form 872-A includes

the following language in paragraph (5):

Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b), but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

We understand that the proposed language has been approved by the Office of Chief Counsel (Chief Counsel).

The Service's Examination Division does not intend to have [REDACTED] or any of its subsidiaries sign the proposed Form 872-A as the tax matters partner (TMP) or any other authorized representative of any partnership or LLC.

Legal Discussion

Except as otherwise provided by I.R.C. §6501, the maximum date for assessment of income tax for a taxable year expires three years after the taxpayer files the related return. I.R.C. §6501(a). However, this general rule is subject to two relevant exceptions.

The first exception is the extension of the maximum date through the execution of a written agreement before the expiration of the general three-year period. I.R.C. §6501(c)(4). The second exception is created by the reference in I.R.C. §6501(n)(2) to the provisions of I.R.C. §6229 for extensions related to partnership items defined in I.R.C. §6231(a)(3).

Except as otherwise provided in I.R.C. §6229, the period for assessing any income tax that is attributable to any partnership

item or affected item for a partnership taxable year generally expires no earlier than three years after the later of (1) the filing date of the partnership return for such taxable year; or (2) the due date for filing the return (determined without regard to extensions). I.R.C. §6229(a). However, such period may be extended as follows:

- a. With respect to any partner, by an agreement between such partner and the Service.
- b. With respect to all partners, by an agreement between the Service and the TMP or any other person authorized by the partnership in writing to enter the agreement.

I.R.C. §6229(b)(1)(A) and §6229(b)(1)(B).

In addition, any agreement under I.R.C. §6501(c)(4) applies to the period specified in I.R.C. §6229(a) only if the agreement expressly provides that it applies to tax attributable to partnership items. I.R.C. §6229(b)(3); Rhone-Poulenc Surfactants and Specialties, L.P. v. Commissioner, 114 T.C. No. 34 (2000).

Coordination with Consolidated Return Provisions

A partner under TEFRA includes both (a) a partner in a partnership and (b) any other person whose income tax liability is determined in whole or in part by taking into account directly or indirectly a partners' partnership items. I.R.C. §6231(a)(2)(A) and §6231(a)(2)(A). A person includes a corporation. I.R.C. §7701(a)(1).

The tax liability of each member of [REDACTED]'s affiliated group is determined by taking into account directly and indirectly any partnership item of any group member that contributes to the group's consolidated taxable income and each group member's separate taxable income. Treas. Regs. §1.1502-2, §1.1502-11(a), and §1.1502-12. In addition, [REDACTED], as the common parent corporation, and each subsidiary-member of the [REDACTED] affiliated group during any part of [REDACTED] generally will be severally liable for the [REDACTED] consolidated income tax deficiency determined. Treas. Reg. §1.1502-6(a); J&S Carburetor Co. v. Commissioner, 93 T.C. 166, 168 - 169 (1989); Globe Products Corp. v. Commissioner, 72 T.C. 609, 617 - 620 (1979), acq. 1980-1 C.B. 1; Entertainment Systems, Inc. v. Commissioner, T.C. Memo 1995-401. Consequently, [REDACTED] is a partner or member of a partnership or LLC through its direct ownership of a partnership or LLC interest or through its ownership interest of a subsidiary that is actually owns a partnership or LLC interest under I.R.C. §6231(a)(2).

██████████, as the common parent of the ██████████ affiliated group, is the sole agent for each subsidiary in the group and no subsidiary has authority to represent itself in any tax matter (the common agency rule). Treas. Reg. §1.1502-77(a); Union Oil Co. of California v. Commissioner, 101 T.C. 130, 135 - 138 (1993); Insilco Corp. v. Commissioner, 73 T.C. 589, 595 - 596 (1979), aff'd in unpublished opinion, 659 F.2d 1059 (2d Cir. 1981), acq. in result 1987-1 C.B. 1 - 2 n. 6. As the sole agent, ██████████ is authorized to act in its own name in all matters related to the ██████████ tax liability. Treas. Reg. §1.1502-77(a); J&S Carburetor Co., 93 T.C. at 169; Entertainment Systems, Inc., T.C. Memo 1995-401. Consequently, with exceptions that do not apply to ██████████, no subsidiary has authority to act for or represent itself in any matter related to the group's ██████████ liability. Treas. Reg. §1.1502-77(a).

Matters over which ██████████ has sole authority to act include applications for all extensions of time and the execution of waivers. Treas. Reg. §1.1502-77(a). When ██████████ performs one of such acts, the act is considered as having also been performed by each member of the consolidated group. Treas. Reg. §1.1502-77(a).

Service's Position on Applicability
of Limitation Provisions of I.R.C. §6501 and §6229

TEFRA created unified audit and litigation procedures, including the limitation period under I.R.C. §6229 for assessment of tax and other items related to partnerships subject to TEFRA. However, TEFRA and related changes to I.R.C. §6501 have never contained any language that changed the treatment of a partnership as a nontaxable conduit, the reporting of tax by individual partners based on distributive shares of partnership items on the partners' separate tax returns, or the assessment of the tax related to such items against partners and not the partnership. In addition, TEFRA did not specifically repeal the applicability of the period under I.R.C. §6501 to tax from partnership items or the ability of the Service and a partner to extend such limitation period for only that partner's tax and other items attributable to or affected by that partner's share of partnership items required to be reported on the partner's income tax return for a taxable year. The legislative history and the provisions set forth in I.R.C. §6229(b)(1)(B) for individual partners and the coordination provisions of I.R.C. §6229(b)(2) reflect that such ability was specifically retained. See H.R. Conf. Rep. No. 760, 97th Cong, 2d Sess. (1982), reprinted in, 1982-2 C.B. 600, 662, 665.

In addition, the reference in I.R.C. §6501(n)(2) to I.R.C.

6229 for only extensions of the applicable period under I.R.C. §6501 reflects that the period under I.R.C. §6501 may be open without regard to the provisions of I.R.C. §6229. Such would be the case when a partner fails to file its income tax return under I.R.C. §6501(c)(3) or a partnership return was filed and due before the filing and due dates of an income tax return and the Service and the taxpayer take no action to extend the applicable limitation period.

Furthermore, in 1993, the Supreme Court specifically held that the limitation period under I.R.C. §6501 is based on the specific taxpayer's return and not the return of another taxpayer from whom the taxpayer has received an item. See Bufferd v. Commissioner, 506 U.S. 523, 527, 533 (1993). Finally, the Taxpayer Relief Act of 1987 clarified that the applicable statute of limitation for partnership items commences running based on the partner's return and not the return of the partnership from whom the partner received an item of income, gain, loss, deduction, or credit. See H.R. Conf. Rep. 220, 105th Cong., 1st Sess. 702 - 703 (1997), reprinted in 1997 U.S.C.C.A.N. 1129, 1514 - 1515.

Consequently, the Service has successfully defended consents under I.R.C. §6501 that specifically covered tax attributable to partnership items. Hamdan v. Commissioner, T.C. Memo 2000-19 (appeal by taxpayer (D.C. Cir. April 24, 2000)) (Service's failure to secure consent from S Corporation did not make a notice of deficiency untimely); Foam Recycling Associates v. Commissioner, T.C. Memo 1992-645, aff'd in unpublished opinion, 159 F.3d 1346 (2d Cir. 1998) (Form 872-A executed by limited partner in TEFRA partnership).

Despite the lack of any language repealing the applicability of I.R.C. §6501, the reference to extension of the limitation period in I.R.C. §6501(o), individual partners' ability to extend limitation periods for tax attributable to partnership items, and coordination with I.R.C. §6501(c)(4) in I.R.C. §6229(b)(2), pre-Bufferd reported decisions dealing with the applicable limitation period for tax associated with TEFRA partnership items created a conflict as to the applicability of I.R.C. §6229 and/or §6501 for determining the limitation period for assessment of tax and other items related to TEFRA partnership adjustments.

Some pre-Bufferd decisions specifically held that I.R.C. §6501(a) does not apply to income tax attributable to partnership items. Boyd v. Commissioner, 101 T.C. 365, 370 (1993); Cambridge Research and Development Group v. Commissioner, 97 T.C. 287, 292 (1991). Such decisions used the predecessor of I.R.C. §6501(n) (I.R.C. §6501(o)) to support their holding, but glossed over the

reference in such predecessor to I.R.C. §6229 for purposes of an extension of the period of I.R.C. §6501 for partnership items and the failure of either I.R.C. §6501 or §6229 to repeal the applicability of I.R.C. §6501 to partnership items.

Without appearing to examine the reference to I.R.C. §6229 in the predecessor of I.R.C. §6501(o) for extensions related to partnership items and to I.R.C. §6501(c)(4) in I.R.C. §6229, other pre-Bufferd decisions hold that the provisions of I.R.C. §6229 govern the limitation periods independent of I.R.C. §6501. In re Frary, 117 B.R. 541, 545 (Bankr. D. Alaska 1991); Metals Refining Ltd. v. Commissioner, T.C. Memo 1993-115; Lumentics v. Commissioner, T.C. Memo 1992-630.

However, other decisions recognize that the provisions of I.R.C. §6501(a) and §6229 are interdependent and apply to assessment periods for tax attributable to partnership items based on the following factors:

- a. The provisions of I.R.C. §6501(n)(2) referring to I.R.C. §6229 for extension of the period for partnership items under I.R.C. §6231(a)(3) and the coordination between I.R.C. §6501(c)(4) and §6229 discussed in I.R.C. §6229(b)(3).
- b. The view that the language of I.R.C. §6501(a) provides a maximum or ending period for assessment through use of "shall be assessed within" and that the language of I.R.C. §6229(a) lacks an ending date or provides a minimum assessment period that may expire after the specified period based on the use of "shall not expire before".
- c. The view that I.R.C. §6229 extends or suspends the limitation period under I.R.C. §6501.

Rhone-Poulenc Surfactants and Specialties, L.P., 114 T.C. No. 34; Estate of Quick v. Commissioner, 110 T.C. 172, 181 - 182 (1998), motion for reconsideration denied, 110 T.C. 440 (1998); Wayne Caldwell Escrow Partnership v. Commissioner, T.C. Memo 1996-401 (appeal by taxpayer (5th Cir. November 4, 1996)); O'Rourke v. Commissioner, T.C. Memo 1997-152; Williams v. United States, 974 F. Supp. 1206, 1210 (C.D. Ill. 1997); Manas v. Commissioner, T.C. Memo 1992-454; Crnkovich v. United States, 81 AFTR2d 98-2399 & n. 7 (Fed. Cl. 1998), aff'd, 85 AFTR2d 772 (Fed. Cir. 2000); In re Madden, 96-1 U.S.T.C. ¶50,263 (Bankr. D.N.J. 1996).

Based on the decisions that recognize that the provisions of I.R.C. §6501(a) and §6229 are interdependent and apply to assessment periods for tax attributable to partnership items, the Bufferd decision, and the 1997 legislative clarification, the

Service's position is that I.R.C. §6229 does not contain the exclusive provisions for the applicable limitation period, but only set forth a minimum assessment period that serves to extend the general assessment period of I.R.C. §6501.

(b)(7)a
(b)(7)a

(b)(7)a

Issue A - Application of Law to Facts

The three-year limitation period for [REDACTED] tax, additions to tax, and interest attributable to items related to TEFRA partnerships in which [REDACTED] and its subsidiaries had any interests can be extended to an indefinite date after [REDACTED] by the proposed Form 872-A executed before such date. The language of such Form 872-A is sufficiently broad to cover tax attributable to partnership and affected items, computational adjustments, and partnership items converted to nonpartnership items under I.R.C. §6231. Consequently, once executed, the Form 872-A will extend the applicable period for assessment to an indefinite future date after [REDACTED]. I.R.C. §6229(a), §6229(b)(1)(B), §6229(b)(2)(B), §6229(b)(3), §6501(c)(4), and §6501(n)(2).

However, the proposed Form 872-A does not specifically cover TEFRA adjustments and other items related to any LLCs. Therefore, we recommend that the Service amend the language of the fourth and fifth sentences of paragraph (5) of the Form 872-A to cover LLCs.

Issue B - Application of Law to Facts

[REDACTED] is the proper person to execute a binding consent to extend the applicable limitation period for assessment of tax and other items related to partnership items of [REDACTED] and any subsidiary. First, regardless of whether [REDACTED] is a partner itself or through its interests in the subsidiaries, [REDACTED] is a partner under I.R.C. §6231 because the tax liability of [REDACTED] and each [REDACTED] subsidiary is determined in part by taking into account directly and indirectly any partnership item of any member of the [REDACTED] affiliated group that contributes to the group's taxable income and each member's separate taxable income. Treas. Regs. §1.1502-2, §1.1502-6(a), §1.1502-11(a), and §1.1502-12. Second, [REDACTED], as the common parent, is the sole

entity that may execute the Form 872-A. Treas. Reg. §1.1502-77(a); Union Oil Co. of California, 101 T.C. 130, 135 - 138 (1993); Insilco Corp., 73 T.C. 589, 595 - 596; J&S Carburetor Co., 93 T.C. at 169.

Conclusion

[REDACTED] and the Service may execute the proposed Form 872-A before [REDACTED]. The language for the portion of [REDACTED]'s Form 1120 liability attributable to partnership and affected items, computational adjustments, and partnership items converted to nonpartnership items under I.R.C. §6231 will protect the Service's interest with respect to matters attributable to such items.

However, the Form 872-A does not specifically cover TEFRA items related to LLCs that have elected to be treated as partnerships. Therefore, we recommend the TEFRA adjustments and other items related to any electing LLCs. Therefore, we recommend that the Service amend the language of paragraph (5) of the proposed Form 872-A to cover electing LLCs. The recommended modifications include the insertion of "limited liability company that has elected to be treated as a partnership" after "partnership" and "limited liability companies that have elected to be treated as partnerships" after "partnerships" in the fourth and fifth sentences of paragraph (5) of the proposed Form 872-A.

Attached are the original and copy of the approved Form 872-A provided this office.

Because no further action is required by this office, we are closing our file.

If you have any questions, please contact me at 404/338-7943.


CAROLYN L. ROUNTREE
Special Litigation Assistant

- ✓ Attachments:
As stated above
- ✓ cc: TL Cats

CC:SER:GEO:ATL:TL-N-4001-00
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page 10

✓ cc: Mr. Roy Allison, Assistant Regional Counsel (TL)
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